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No. 02-1603

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

BRIEF FOR AMICUS CURIAE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED AND QUESTION ADDRESSED BY AMICUS PACDL

1. Was the decision in *Mills v. Maryland*, 486 U.S. 367 (1988), dictated by this Court's precedents in existence at the time respondent's conviction became final?

2. Was the Pennsylvania Supreme Court's decision in this case "contrary to" and an "unreasonable application of clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1)?

This brief amicus curiae addresses only the first of the questions presented.

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BRIEF OF AMICUS CURIAE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

The Pennsylvania Association of Criminal Defense Lawyers files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent George E. Banks. The petitioners and the respondent have both granted consent to file this brief, and letters of consent have been filed with the Clerk of this Court.*

INTEREST OF AMICUS

The Pennsylvania Association of Criminal Defense Lawyers, known as PACDL, is a Pennsylvania nonprofit corporation established in 1988, whose membership comprises over 600 public and private criminal defense attorneys from throughout the Commonwealth. An affiliate of NACDL, the Association attempts, as stated in its by-laws, "to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases"; "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself"; "to protect and insure by rule of law, those individual rights guaranteed by the Pennsylvania and United States Constitutions"; and "to promote the proper administration of criminal justice." PACDL is the only statewide organization working strictly on behalf of the professional interests of public and private criminal defense lawyers, including the

* No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than PACDL and its membership, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

rights of their clients. Many of PACDL's most active and dedicated members have a substantial commitment to the defense of capital cases. The members of PACDL are united in their support of keeping the cherished privilege of access to habeas corpus open as a safeguard for the protection of the federal constitutional rights of our clients. PACDL filed a brief and participated in argument before the Third Circuit in this case. This *amicus* brief arises out of our members' dedication to the preservation of our system of justice.

INTRODUCTORY SUMMARY OF FACTS AND OF THE CASE

George Banks, the respondent, who was suffering from a severe mental illness characterized by fixed delusional beliefs, committed multiple murders. After a trial and penalty phase proceeding before a jury, he was convicted and sentenced to death. The jury reported that it had found one out of three mitigating circumstances proffered by Banks, and one aggravating circumstance. While acknowledging that Banks "suffers and has suffered from a mental defect that contributed to his bizarre behavior," the Pennsylvania Supreme Court affirmed his convictions and death sentences. *Commonwealth v. Banks*, 521 A.2d 1, 15 (Pa.) ("*Banks I*"), *cert. denied*, 484 U.S. 873 (1987). The state courts also denied Banks' first petition for state post-conviction relief, in which he raised a claim that the jury instructions and verdict sheet violated *Mills v. Maryland*, 486 U.S. 367 (1988). *See Commonwealth v. Banks*, 656 A.2d 467, 470 (Pa.) (JA 119-38) ("*Banks II*"), *cert. denied*, 516 U.S. 835 (1995).

Banks' first federal petition for a writ of habeas corpus was ultimately dismissed without prejudice, pending exhaustion of certain claims. See *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997). After Banks unsuccessfully completed the required exhaustion of state remedies, he refiled his petition. The Third Circuit ordered that penalty phase relief be granted to Banks on his *Mills* claim. *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001) ("*Banks III*"). The Third Circuit ruled that the jury instructions and verdict sheet violated *Mills*, that no retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989), was required because the state court had ruled on the merits of the *Mills* claim, and that the state supreme court's denial of the *Mills* claim was an unreasonable application of *Mills*. This Court granted the Commonwealth's *certiorari* petition, vacated the Third Circuit's judgment, and remanded for a *Teague* analysis. *Horn v. Banks*, 536 U.S. 266 (2002) (*per curiam*) ("*Banks IV*"). On remand, the Third Circuit majority concluded that the result in *Mills* had been dictated by prior precedent, primarily this Court's *Lockett* line of decisions. *Banks v. Horn*, 316 F.3d 228 (3d Cir. 2003) ("*Banks V*"), referencing *Lockett v. Ohio*, 436 U.S. 586 (1978).

This Court granted *certiorari* again on Sept. 30, 2003.

SUMMARY OF ARGUMENT

This Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), did not announce a new rule of law; rather, it was dictated by then-existing precedent. In addition to the line of cases under *Lockett v. Ohio*, 436 U.S. 586 (1978), which disallows limitation of jury consideration of mitigating circumstances, as primarily relied on by the Court, *Mills* was also dictated by the Court's decisions under the Eighth and Fourteenth Amendments prohibiting arbitrary capital sentencing procedures.

The jury instructions and verdict sheet used in *Mills* (and in this case) were likely understood by the jury as requiring all jurors to find any particular mitigating factor

unanimously before they could weigh that factor against the aggravating factor(s) established by the State. As a result, a single juror's disagreement could block the jury as a whole from weighing mitigating against aggravating circumstances in cases where all the jurors thought there was substantial mitigation. Allowing a single juror to compel a death sentence by simply refusing to find any mitigating circumstance, or to find a certain one – even circumstances which all the other jurors were convinced had been established – was aptly characterized by this Court as the "height of arbitrariness." *Mills*, 486 U.S. at 374. The sentencing process created by the jury instructions and verdict sheet was arbitrary – in violation of *Furman v. Georgia*, 408 U.S. 232 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) – in that it failed to provide for a rational, predictable and neutral sentencing process. In other words, it failed to provide the heightened reliability required by the Eighth Amendment.

That conclusion is dictated by this Court's existing precedents as of 1987 – the earliest date when respondent's conviction could be deemed to have become final. In addition to establishing a general prohibition against arbitrariness in capital sentencing, those precedents contain specific requirements that were violated in *Mills* and here. First, *Caldwell* and other decisions establish that the State may not materially misinform the jury concerning its role in the sentencing process. In *Mills* and here, the instructions and verdict sheet appeared to set up a sentencing scheme different from the one established by the Commonwealth's capital sentencing statute, rendering the process arbitrary and unpredictable. Second, this Court's arbitrariness precedents establish that the capital sentencing process must not operate in a manner that is biased in favor of the death sentence. By enabling a single juror to preclude other jurors

from weighing mitigating factors, the verdict sheet's (and instructions') mistaken jury unanimity requirement skewed the capital sentencing process in favor of death, making it biased and therefore arbitrary.

ARGUMENT

MILLS WAS DICTATED BY TWO INDEPENDENT LINES OF THIS COURT'S THEN-EXISTING PRECEDENT.

In *Teague v. Lane*, 489 U.S. 288 (1989), a plurality proposed that, subject to very narrow exceptions, habeas petitioners may not obtain habeas relief based on "new" rules that were announced after their convictions became final. This doctrine was adopted by the Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002). Under *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States." *Id.* at 301. On the other hand, if a holding is dictated by existing precedent, it is not "new." *Id.*; *Penry*, 492 U.S. at 319.

Petitioners assert that *Mills* announced a new rule when it was decided in 1988, and therefore that Banks is not entitled to rely on *Mills*. Assuming *arguendo* that Banks' conviction became final in 1987,[1] he can still rely on *Mills*,

[1] Ordinarily, the finality date for Banks would be October 5, 1987, when this Court denied his *certiorari* petition. Banks argues that the finality date should be 1995, when the Pennsylvania supreme court denied his post-conviction petition; concurring in the judgment of the court below, Judge Sloviter agreed with this analysis. *See Banks V*, 316 F.3d at 255. Obviously, if Banks' conviction was not final for *Teague* purposes until 1995, he is entitled to rely on *Mills*. For purposes of the argument presented here, amicus PACDL assumes that Banks' conviction became final in 1987.

because the result in *Mills* was dictated by existing precedent within the meaning of the *Teague* doctrine.

This Court made clear in *Mills* that, even before *Mills* was decided, it was already "well established," under *Lockett v. Ohio*, 436 U.S. 586 (1978), and its progeny, that the Eighth Amendment prohibits *any* "barrier to the sentencer's consideration of all mitigating evidence." *Mills*, 486 U.S. at 374-75. Furthermore, this court found that, under *Lockett*, this rule "must be" applied to a "single holdout juror's vote against finding the presence of a mitigating circumstance." *Id.* Thus, as the Third Circuit found, *Banks V*, 316 F.3d at 235-45, and as Respondent argues in his Brief, *Mills* was compelled by *Lockett* and its progeny.

In addition to relying on the *Lockett* line of cases, in *Mills* this Court found that it would be the "height of arbitrariness to allow or require the death penalty," where either a single juror's vote against finding mitigating circumstances, or the failure of all the jurors to agree unanimously as to any of the mitigating circumstances, would preclude the jurors from weighing any of the proffered mitigating circumstances. *Mills*, 486 U.S. at 373-74. In *Mills* and *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court majorities evidently conceived of the "arbitrariness" of such a proceeding as arising from the *Lockett* violation. *Compare McKoy*, 494 U.S. at 440 (in *Mills*, "we held that it would be the 'height of arbitrariness to allow or require the imposition of the death penalty' where 1 juror was able to prevent the other 11 from *giving effect* to mitigating evidence") *with Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (*Lockett* prohibits states from preventing the sentencer "from considering and *giving effect* to [mitigating] evidence").

In *McKoy*, however, Justice Kennedy expressed a different view. Justice Kennedy suggested that the result in *Mills* should be predicated not on *Lockett*, but on the Eighth

Amendment prohibition against arbitrariness in capital sentencing proceedings. According to Justice Kennedy:

> Application of the death penalty on the basis of a single juror's vote is "intuitively disturbing." [*Mills*, 486 U.S. at 374]. More important, it represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in *Mills* described such a result as the "height of arbitrariness." *Ibid.* Given this description, it is apparent that the result in *Mills* fits within our line of cases forbidding the imposition of capital punishment on the basis of "caprice," in "an arbitrary and unpredictable fashion," or through "arbitrary" or "freakish" means.

McKoy, 494 U.S. at 454 (Kennedy, J., concurring). As Justice Kennedy further noted, "Given the reasoned, moral judgment inherent in capital sentencing by the jury, the extreme arbitrariness of this potential result is evident." *Id.*

For *Teague* purposes, the question raised by Justice Kennedy's concurrence is whether the result in *Mills* was "dictated by" the Eighth Amendment arbitrariness principle, as well as or apart from the *Lockett* principle relied on by the majority in *Mills* and *McKoy*. For the reasons that follow, it was so dictated.

Going back to the unifying principle underlying the separate opinions comprising the seminal decision of *Furman v. Georgia*, 408 U.S. 232 (1972), this Court has made clear that capital sentencing schemes must "be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Furman*). The schemes involved in *Mills* and here (created by faulty and misleading instructions, coupled with an even more misleading verdict form,

not by the Maryland or Pennsylvania statute) allowed a lone juror's refusal to find a single mitigating circumstance, or the failure of all jurors to agree on any particular mitigating circumstance, to preclude the rest of the jury from weighing *any* mitigating circumstances.

In either event, the effective result was a mandatory death sentence, as long as the State had proven the existence of even a single aggravating circumstance. *See Mills*, 486 U.S. at 373-74; *McKoy*, 494 U.S. at 452 (Kennedy, J. concurring) (such a scheme "can allow the ... requirement of unanimity to produce a capital sentence that lacks unanimous support of the jurors, and, more than this, is thought to be inappropriate by 11 of the 12."). And even if all jurors were convinced on one mitigating circumstance, a single juror could still prevent the rest from weighing other mitigating evidence that they were convinced the defense had established.

There can be little question that adding a jury unanimity requirement for mitigators, which is not even present in the capital sentencing statute,[2] introduces an arbitrary and unpredictable element into the sentencing process that is inconsistent with the requirements of predictability, rationality and heightened reliability in capital sentencing that have been enshrined in Eighth Amendment jurisprudence since *Furman*. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (discussing need for heightened reliability in capital sentencing proceedings). Accordingly, as Justice Kennedy reasoned in *McKoy*, the conclusion that a jury unanimity requirement is impermissibly arbitrary "fits within," *McKoy*, 494 U.S. at 454, the core principles of this Court's Eighth Amendment arbitrariness decisions.

[2] *See Commonwealth v. Williams*, 570 A.2d 75, 82 (Pa. 1990) ("our statute does not require unanimity in establishing mitigating circumstances"); *Commonwealth v. Frey*, 554 A.2d 27, 31 (Pa. 1989) ("The perceptions of even one juror, alone, with regard to mitigating circumstances, would be sufficient to deny the unanimity required for a sentence of death.").

Standing alone, it might be that the prohibition against arbitrariness in capital sentencing is too general a principle to "dictate" the result in *Mills*. *See Gilmore v. Taylor*, 508 U.S. 333, 344 (1993) ("the level of generality at which respondent invokes this line of cases is far too great to provide any meaningful guidance for purposes of our *Teague* inquiry"). Well before Banks' presumed finality date of 1987, however, this Court had articulated more specific arbitrariness principles that dictate the result in *Mills*.

First, Pennsylvania's capital sentencing statute does not require that jury findings with respect to mitigation be unanimous. Nevertheless, the jury instructions and verdict sheet *did* seem to require unanimity. As a result, the trial court misled the jury into thinking that it had to be unanimous, violating the Eighth Amendment's requirement of heightened reliability in capital sentencing proceedings. Second, the instructions and verdict sheet requiring unanimity on mitigation created a bias in favor of death. In a neutral system, the jurors would either decide individually whether mitigating circumstances were established, or a mistrial would be declared if the jurors were not unanimous. The system created by the instructions and verdict sheet here and in *Mills* — in which no mitigating factors are found unless the jury is unanimously convinced of them, and in which mitigating evidence that is not "found" cannot be "weighed" — places the entire risk of non-unanimity on the defendant. Such a system is biased in favor of death. It was therefore already clearly forbidden in 1987, under this Court's long-standing precedents.

1. The jury instructions and verdict sheet misled the jury into thinking unanimity was required to find mitigating circumstances.

The jury charge and verdict sheet misled the jury into believing it had to find mitigating factors unanimously before it could weigh those factors against the aggravating factors. The Pennsylvania capital sentencing statute does *not* require that jurors be unanimous in order to find and weigh mitigating factors, but rather allows jurors to weigh whatever mitigating factors they individually find by a preponderance of the evidence. *See Banks II*, JA 124; *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989). Nevertheless, as discussed in detail in Respondent's Brief, the instructions and verdict sheet likely led the jury to believe that unanimity *was* required to find and weigh mitigating factors. The instructions and verdict sheet thus misled the jury as to its role in the sentencing process under Pennsylvania law.

Such misleading of the jury contravenes the long-standing Eighth Amendment guarantee of heightened reliability in capital sentencing, which is one aspect of the prohibition against arbitrariness in capital sentencing. *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); *Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 305. It is self-evident that a sentencing jury that misunderstands how it is to carry out its role in the statutory sentencing process cannot provide the kind of heightened reliability required by the Eighth Amendment. Indeed, in *Caldwell*, this Court held (in 1985) that the "jury must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994).[3]

[3] That was the position adopted by Justice O'Connor. 472 U.S. at 343. Her opinion provided the decisive fifth vote, and thus, because it was not inconsistent with the plurality's position, constitutes the holding of *Caldwell*. *See Romano*, 512 U.S. at 9.

Thus, the holding of *Caldwell* – that the State may not materially mislead the jury concerning its role in the sentencing process – dictated the result in *Mills*, as it dictates affirmance here. Both in *Mills* and in respondent's case, the jury instructions and verdict forms misled the sentencing juries into believing they must be unanimous to find mitigating circumstances, when in fact state law contained no such requirement. Propounding such disinformation to the jury introduces a constitutionally unacceptable level of arbitrariness into the capital sentencing process, as was clear at least by 1985, when this Court decided *Caldwell*.

2. The jury instructions and verdict sheet created a bias in favor of a death sentence for respondent, in violation of the Eighth and Fourteenth Amendments.

As this Court's precedents make clear, the Eighth Amendment's prohibition against the arbitrary imposition of the death sentence forbids a State, through the Fourteenth Amendment's Due Process guarantee, from imposing capital punishment on the basis of proceedings that are biased in favor of death. *Stringer v. Black*, 503 U.S. 222, 235-36 (1992) (presence of an invalid aggravating factor in a weighing State would create an impermissible "bias in favor of the death penalty"); *Caldwell*, 472 U.S. at 330-33 (misleading argument about appellate review creates "intolerable danger of bias toward a death sentence"); *California v. Ramos*, 463 U.S. 992, 1010-12 (1983) (accurate instruction about Governor's commutation power permissible, because it would not result in bias in favor of death sentence). The effect of the jury instructions and verdict sheet here was that anything less than a unanimous vote in favor of a mitigating circumstance resulted in a failure to "find" that circumstance, removing it from the weighing process. As a result, the process was arbitrarily – and unconstitutionally – skewed towards death.

Petitioners here attempt to compare the erroneous jury unanimity requirement to a requirement that mitigating factors be established by a preponderance of the evidence – a provision that this Court found constitutionally acceptable (post-*Mills*) in *Walton v. Arizona*, 494 U.S. 639, 649-51 (1990) (plurality opinion), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). See *Brief for Petitioners* at 21 n.11. This comparison does not begin to withstand scrutiny.

The burden-of-proof requirement approved in *Walton* merely established a threshold for the jury to use in deciding whether the mitigating evidence presented was sufficiently credible to be placed in the weighing process. The unanimity requirement – as it operated here – meant that a single juror (or two or three) could prevent all the other jurors from weighing mitigating evidence that they were absolutely convinced had been established, and which they believed demanded a life sentence. Whether a jury unanimity requirement operates neutrally, or is biased in favor of one side or the other, depends on what happens if the jury is *not* unanimous. If a non-unanimous jury results in a mistrial, the requirement is neutral. If either side *wins* on the basis of non-unanimity, the requirement is biased against the losing side. Here, unless the defendant (respondent) convinced all twelve jurors that a mitigating circumstance had been established, none of the jurors could weigh evidence that might otherwise have resulted in a life sentence.[4]

[4] Petitioners attempt to make an analogy to decisions purportedly holding that unanimity requirements are permissible with respect to affirmative defenses in criminal cases. *Brief for Petitioners* at 21 n.11 (citing *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197) (1977); *Rivera v. Delaware*, 429 U.S. 877 (1976) (mem.)). In fact, all of those decisions deal with burden-of-proof requirements, *not* unanimity rules. While this Court has not addressed a unanimity requirement with respect to an affirmative defense, most decisions in

Accordingly, the requirement mistakenly imposed by the jury instructions and verdict form in this case was impermissibly biased in favor of a death sentence. Given this Court's clear statements in *Stringer*, *Caldwell* and *Ramos* that such death-prone proceedings violate the Eighth Amendment, and the more general requirement of heightened reliability in capital sentencing, the result in *Mills*, which invalidates those instructions and that verdict form, was dictated by this Court's pre-1987 precedent.

(cont'd)

non-capital cases have rejected such requirements, on various grounds. *See Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 982-85 (9th Cir. 1992) (collecting such criminal cases, while discussing issue in context of civil litigation). *A fortiori*, the jury unanimity requirement here, which allowed any non-unanimity to compel a sentence of death, violated the Eighth Amendment's prohibition against arbitrariness in capital sentencing.

CONCLUSION

The Pennsylvania Association of Criminal Defense Lawyers urges that the decision of the United States Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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